

**CALIFORNIA COASTAL COMMISSION**

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Commission Action:



**STAFF REPORT AND RECOMMENDATION ON APPEAL**  
**SUBSTANTIAL ISSUE AND DE NOVO**  
**COASTAL DEVELOPMENT PERMIT**

**LOCAL GOVERNMENT:** City of Huntington Beach

**LOCAL DECISION:** Approval with Conditions

**APPEAL NUMBER:** A-5-HNB-99-275

**APPLICANT:** **The Robert L. Mayer Trust  
c/o The Robert Mayer Corporation  
and the City of Huntington Beach Redevelopment Agency**

**AGENT:** Larry Brose, The Robert Mayer Corporation

**PROJECT LOCATION:** 5.01 acre parcel located approximately 1,000 feet inland of the northwest corner of Pacific Coast Highway and Beach Boulevard, Huntington Beach, Orange County

**PROJECT DESCRIPTION:** Appeal of City of Huntington Beach approval of coastal development permit to fill 0.8 acres of degraded wetland and 1.4 acres of restorable wetland for unspecified development on a 5.01 acre parcel owned by the City of Huntington Beach. Fill would occur within a 2.9-acre portion of the parcel that is zoned residential with a Conservation Overlay. The proposed off-site mitigation, which consists of the creation of 1.0 acre of new wetland and wetland transitional habitat and the enhancement of 1.4 acres of existing transitional, upland, and woodland habitat is located outside of the Coastal Zone at the Shipley Nature Center.

**APPELLANTS:** Coastal Commissioners Cecilia Estolano & Pedro Nava

**STAFF NOTE:**

1. This appeal involves the City of Huntington Beach's approval of .8 acres of wetland fill for unspecified development on a 5 acre parcel owned by the City. The City's approval was based on the application of its LCP that incorporated by reference the Commission's Interpretive Guidelines relating to wetlands. The Commission's several interpretive guidelines, adopted between 1977 and 1981, were intended to assist in understanding how Coastal Act policies may be applied at the time when they were adopted. However, interpretive guidelines are what their name denotes and do not, and indeed cannot, by virtue of their own operation and effect authorize or prohibit any particular uses of coastal resources. In this case, however, because the City of Huntington Beach elected and the Commission approved the incorporation of the wetland guidelines into the LCP, the language of those guidelines

became legally enforceable and controlling provisions of the LCP. Accordingly, decisions identified as having been made pursuant to the Commission's Guidelines were in fact made pursuant to the City's certified LCP.

The Chapter 3 policies of the Coastal Act, the Commission's regulations, and the certified LCP, provide the operative authority and standards of review for regulatory and planning decisions under the Coastal Act. On appeal, the Commission reviews the project as it was proposed to and approved by the local government for its consistency with the certified LCP and where applicable, the access and recreation policies of the Coastal Act. The LCP must be interpreted in a manner consistent with the Coastal Act and its implementing regulations. As with any application of standards of review, the application must also be interpreted in light of and conform to any judicial rulings affecting the implementation of those provisions. Examples of such rulings include *Nollan v. CCC* (1987) 483 U.S. 825, *Dolan v. City of Tigard* (1994) 512 U.S. 374, *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, *Sierra Club v. CCC* (1993) 15 Cal.Rptr. 2d 779, and *Bolsa Chica Land Trust v. Superior Court* (1999) 83 Cal.Rptr. 850.

2. On April 16, 1999, the Army Corps of Engineers (Corps) provided a letter of denial without prejudice to the applicants, in response to the applicant's notification to the Corps of their intent to carry out a project under the nationwide permit (NWP) 26. Because the Commission disagreed with the Corps' consistency determination for the Nationwide Permit Process, a Coastal Zone Management Act (CZMA) consistency certification or coastal development permit must be obtained prior to the applicant proceeding under the NWP 26. Because the CDP approved by the City was appealed by the Commissioners, the applicants have not yet received the required consistency with the CZMA. The Corps letter also states that, "... provisional verification is valid for a period not to exceed two years unless the NWP is modified, reissued, revoked, or expires before that time." The NWP has been modified. Recent changes to the regulations governing the NWP 26 will go into effect on June 8, 2000. The changes to the Corps regulations will reduce the maximum area of wetland fill permitted under an NWP 26 from 3 and 1/3 acres to 0.5 acres. Under the new Corps regulations, if the applicants do not receive the required CZMA consistency by June 8, 2000, they will have to re-apply for an individual Corps permit to fill greater than 0.5 acres of wetland.

### **SUMMARY OF STAFF RECOMMENDATIONS**

The staff recommends that the Commission, after public hearing, determine that **A SUBSTANTIAL ISSUE EXISTS** with respect to the grounds on which the appeal has been filed because the locally approved development raises issues of consistency with the City of Huntington Beach certified Local Coastal Program (LCP). More specifically, the wetland fill approved by the City raises issues of consistency with certified LCP policies and standards that require that wetlands be preserved and enhanced.

The City's certified LUP specifically incorporates Section 30233 of the Coastal Act, which limits fill to eight enumerated uses. Although the City's approved coastal development permit (CDP) does not describe the future use of the site, a review of the City's record indicates that the future use is expected to be residential. Neither residential development nor grading for an unspecified future use are allowable uses under Section 30233. Therefore, the project approved by the City raises a substantial issue as to its consistency with the certified LUP policies that limit the types of use for which a wetland can be filled.

The subject site is also discussed in the Implementation Plan portion of the City's certified LCP in the Downtown Specific Plan (DTSP). The DTSP designated the subject site with a Conservation Overlay.

The Conservation Overlay states: *"If any wetland is determined by the California Department of Fish and Game (CDFG) to be severely degraded pursuant to Section 30233 and 30411 of the California Coastal Act, or if it is less than one (1) acre in size, other restoration options may be undertaken, pursuant to the Coastal Commission's Statewide Interpretive Guidelines for Wetlands and other Wet Environmentally Sensitive Habitat Areas (Commission's Guidelines)."*

With regard to wetlands less than one acre in size, the Certified LCP indicates that some fill for a non-allowable use is appropriate only if the overall project is a restoration project and if the wetland to be filled is small, extremely isolated and incapable of being restored. The project as approved by the City proposes wetland fill for an unspecified purpose within a residential zone along with an off-site mitigation plan. Therefore, the purpose of the overall project, including the fill and mitigation, cannot be considered restoration. In addition, the Fish and Game determination for the project site has determined that the freshwater wetland can feasibly be restored to a larger wetland.

With regard to other restoration projects that may be permitted under Section 30411, other than boating facilities, the Certified LCP states that such restoration projects should result in no net loss of the acreage of wetland habitat located on the site. As discussed above, the project approved by the City cannot be considered restoration and would result in the loss of all on-site wetlands. In addition, Section 30411 of the Coastal Act cannot be used as the basis for approval of new development in wetlands for otherwise non-permitted uses. Consequently, section 30411, as referenced in the LCP, cannot be used as a basis for justifying the fill of these wetlands. Therefore, the project as approved by the City raises a substantial issue as to its consistency with the certified LCP, including the Conservation Overlay.

For the reasons described below, staff also recommends that the Commission, at the **DE NOVO** public hearing, **DENY** the proposed project on the grounds that it is inconsistent with the City's certified local coastal program policies and standards regarding wetland protection. As discussed above, the proposed fill of wetlands for an unspecified purpose within a residential zone is not an allowable use under the Certified LCP or the Coastal Act. Additionally, approval of the proposed project would not comply with either the Certified LCP or the California Environmental Quality Act because there are feasible mitigation measures and alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

The applicants have submitted an alternatives analysis to the proposed fill of the on-site wetland. The analysis considered three alternatives: 1) to maintain the wetlands on-site in their current condition; 2) to restore the on-site wetlands and transitional area; and 3) to provide off-site habitat enhancement to offset proposed project impacts.

The applicant dismisses the first alternative of retaining the wetlands on-site in their current condition due to the degraded nature of the wetlands. The applicant dismisses the second alternative of on-site wetlands restoration because the primary water supply feeding the wetlands is low quality urban runoff, and if the site were restored it would provide only minimal habitat value. The third alternative, off-site mitigation, was chosen by the applicant and the City as the preferred alternative because the proposed off-site location (Shipley Nature Center) is a part of a larger wetlands and uplands habitat enhancement program, including restoration, enhancement, and creation of additional freshwater wetland. The applicant has indicated that the Shipley Nature Center is a high value habitat area.

Although the proposed mitigation site may be a significant habitat area, it does not eliminate the necessity for the proposed project to conform to the City's Certified LCP, which includes the requirements of Section 30233. Total loss of the on-site wetlands cannot be considered the least

environmentally-damaging alternative, even if higher value habitat is created elsewhere. The on-site wetlands clearly are degraded. It has been argued that the only way to finance the off-site mitigation is to allow the filling of the on-site degraded wetlands. However, there is no provision in the City's Certified LCP that would allow fill of existing wetlands in order to finance the enhancement of off-site wetlands. In addition, the Fish and Game determination for the project site has determined that the freshwater wetland can feasibly be restored to a larger wetland. Thus, the degraded nature of the on-site wetlands does not provide a basis to justify filling them. In addition, the entire parcel is 5.01 acres. Development of the parcel is clearly feasible without filling the wetland habitat. Retention of the existing wetlands on-site is thus a feasible alternative and would be less environmentally-damaging than elimination of the wetland. Therefore, the proposed project is not the least environmentally-damaging alternative and so is inconsistent with the City's certified LCP requirement to approve wetland fill only if it is the least environmentally damaging alternative.

If the fill of wetlands here were permissible pursuant to the LCP and the Coastal Act, the mitigation approved by the City is not appropriate. The Commission's Staff Ecologist has determined the total wetland acreage to be 0.696 acre. Based on the Commission's criteria, the proposed off-site mitigation to create one acre of wetland is not adequate to fully offset the proposed fill of 0.696 acres of on-site wetland habitat. The mitigation plan proposes to create only 1.0 acre of new wetland and transitional wetland habitat and to enhance 1.4 acres of existing transitional wetland, upland and woodland habitats. In order to fully mitigate the impacts of the loss of wetland, the mitigation must create in-kind habitat. Therefore, only the creation of 1.0 acre of new wetland habitat can be considered as appropriate mitigation for the proposed project.

The creation of new wetland habitat in upland areas, and areas without the appropriate naturally occurring soil types, can also be difficult to accomplish. The success rate of man-made wetland habitat is generally less than with the restoration of naturally occurring wetland habitat. The applicants propose a ratio of mitigated acres to impacted acres of 3:1; however, this ratio includes the proposed enhancement of 1.4 acres of existing transitional wetland, upland and woodland habitats. Because neither out-of-kind mitigation nor enhancement of existing wetlands can fully mitigate the loss of wetlands, only the 1.0-acre of proposed new wetland and transitional wetland habitat can be included in the mitigation ratio. Thus, the mitigation ratio is reduced to approximately 1.25:1, for the 0.8 acre of wetland the applicants propose to impact. Using the total wetland area determined by the Commission's Staff Ecologist, 0.696 acre, the proposed mitigation ratio would then be increased approximately 1.44:1.

To ensure that adverse impacts to wetlands are fully mitigated, the Commission requires a mitigation ratio sufficient to ensure that wetland habitat is successfully created. The proposed in-kind creation of 1.0 acre of new coastal brackish marsh and transitional wetland habitat is not sufficient to offset the proposed fill of 0.696 acre of existing wetland habitat because neither the kind nor amount of the proposed mitigation will assure that 0.696-acre of wetland habitat is successfully created.

Thus, the proposed project: (1) is not an allowable use under the Certified LCP because it is not for a restoration purpose and results in the loss of all on-site wetlands; (2) is not the least environmentally-damaging alternative as required by the LCP because the applicant can develop the 5.01 acre parcel without impacting the wetlands; and (3) does not fully mitigate its impacts as required by the LCP because the project does not propose in-kind mitigation in an amount sufficient to successfully create wetland habitat. Therefore, staff recommends that the Commission deny the proposed project.

#### **STAFF RECOMMENDATIONS FOR SUBSTANTIAL ISSUE AND DE NOVO PERMIT**

**Procedural Note:** When staff recommends substantial issue, unless three or more commissioners wish to hold a hearing on the question of substantial issue the Commission will have found substantial issue and then proceeds to a de novo hearing on the matter either at the current or a subsequent Commission meeting. If the Commission does go into a hearing on the question of substantial issue, the staff recommends that the Commission take the following actions at the conclusion of that hearing.

The staff recommends that the Commission make the following motions and adopt the following resolutions:

**A. MOTION AND RESOLUTION FOR SUBSTANTIAL ISSUE**

**Motion:** *I move that the Commission determine that Appeal No. A-5-HNB-99-275 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

**Staff Recommendation:**

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the Commissioners present.

**Resolution to Find Substantial Issue:**

The Commission hereby finds that Appeal No. **A-5-HNB-99-275** presents a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

**B. MOTION AND RESOLUTION FOR DE NOVO PERMIT**

**Motion:**        ***I move that the Commission approve De Novo Coastal Development Permit No. A-5-HNB-99-275 for the development proposed by the applicant.***

**Staff Recommendation of Denial:**

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

**Resolution to Deny the Permit:**

The Commission hereby **DENIES** a coastal development permit for the proposed development on the ground that the development will not conform with the policies of City of Huntington Beach Certified Local Coastal Program. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

**LIST OF EXHIBITS:**

- A. Site Vicinity Map
- B. Project Location Map
- C. Letters in Support of the Proposed Project
- D. Letters and Petition in Opposition to the Proposed Project
- E. City of Huntington Beach Notice of Action
- F. Appeal Form D
- G. SEIR 82-2 Plans Depicting Proposed Residential Housing
- H. Conservation Overlay from Downtown Specific Plan
- I. Assessor Parcel Map
- J. Photographs
- K. Vegetation Types Map (LSA) and Map Showing Area Cleared Within Conservation Overlay
- L. City of Huntington Beach Map for District 8b
- M. Department of Fish and Game Determination of Status of the Huntington Beach Wetlands, February 4, 1983
- N. Coastal Commission Memorandum, November 23, 1999
- O. Sample Elevation Points Within Project Area (LSA)

**SUBSTANTIVE FILE DOCUMENTS:**

- 1. City of Huntington Beach Certified Local Coastal Program.
- 2. Local Coastal Development Permit No.99-05.
- 3. Department of Fish and Game Determination of the Status of the Huntington Beach Wetlands, February 4, 1983.
- 4. Superior Court of the State of California, County of San Diego, Case No. 703570, Statement of Decision, Bolsa Chica Land Trust vs. The California Coastal Commission

5. Court of Appeal, Fourth Appellate District, Division One, State of California, Case Nos. D029161 and D030270, Statement of Decision, Bolsa Chica Land Trust v. The Superior Court of San Diego County
6. The Waterfront Development Project Addendum to SEIR 82-2, July 15, 1998
7. Biological Resources Evaluation and Jurisdictional/Wetland Delineation for the Waterfront Development Site, Huntington Beach, CA, February 4, 1998.
8. Habitat Mitigation and Monitoring Proposal (HMMP) for the Waterfront Development, LSA, December 18, 1998
9. Waterfront Development –Wetland Analysis According to Coastal Act Wetland Definition, letter from LSA to Larry Brose, The Robert Mayer Corporation, dated November 3, 1999.
10. Waterfront Development – Alternatives Analysis of Wetland and Transitional Area Resources, LSA, November 5, 1999
11. Huntington Beach “Waterfront Development”, Memorandum from John Dixon to Meg Vaughn and Teresa Henry, dated November 23, 1999.
12. Waterfront Wetlands Restoration Project, Letter and Attachments from the Robert Mayer Corporation to the Commission dated February 9, 2000.
13. Waterfront Wetlands Restoration Program, Shipley Nature Center, City of Huntington Beach Redevelopment Agency in partnership with The Robert Mayer Corporation, February 2000.
14. Army Corps of Engineers Letter dated April 16, 1999.

## **I. SUBSTANTIAL ISSUE FINDINGS AND DECLARATIONS**

The Commission hereby finds and declares:

### **A. APPEAL PROCEDURES**

#### **i. Standard of Review**

The LCP for the City of Huntington Beach (the City) was effectively certified on March 15, 1984. As a result, the City has coastal development permit (CDP) jurisdiction except for development located on tidelands, submerged lands, or public trust lands. The project approved by the City is within the City’s LCP area (Coastal Zone). Therefore, the standard of review for this substantial issue decision is the City’s certified LCP.

**ii. Appealable Development**

Section 30603 of the Coastal Act states:

- (a) *After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:*
  - (1) *Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.*
  - (2) *Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.*

Section 30603(a)(2) of the Coastal Act establishes the proposed project site as being appealable by its location within 100 feet of a wetland (Exhibits A-B).

**iii. Grounds for Appeal**

The grounds for appeal of an approved local CDP in the appealable area are stated in Section 30603(b)(1), which states:

- (b)(1) *The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in this division.*

Section 30625(b)(2) of the Coastal Act requires a de novo hearing of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds for appeal. If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered moot, and the Commission will proceed to the de novo public hearing on the merits of the project. The de novo hearing will be scheduled at the same hearing or a subsequent Commission hearing. At the de novo public hearing on the merits of the project the standard of review is the certified LCP in light of those provisions of applicable law resulting from binding judicial rulings. In addition, for projects located between the first public road and the sea, findings must be made that any approved project is consistent with the public access and recreation policies of the Coastal Act. Sections 13110-13120 of the California Code of Regulations further explain the appeal hearing process.



**iv. Qualifications to Testify Before the Commission**

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. The only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing.

The Commission will then vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project.

At the De Novo hearing, the Commission will hear the proposed project de novo and all interested persons may speak.

**v. Public Comment**

Thirty-one (31) letters and one (1) citizen's petition have been received regarding the subject appeal. Twenty-two (22) of the letters are in support of the project approved by the City, and nine (9) of the letters oppose the project approved by the City. The petition was received at the February Commission meeting and is signed by 90 residents of the community who are in opposition to the project approved by the City and in support of the Commissioner's appeal.

Eight (8) of the letters of support were received from representatives of the City of Huntington Beach. Two letters, from the Robert Mayer Corporation, were in response to the February hearing Staff Report. The Mayer Corporation letters and attachments were handed out to the Commission at the February hearing. In order to minimize the length of exhibits to this staff report, the attachments were not included in this staff report; however, they are referenced as substantive file documents. Other letters of support were received from Orange County Supervisor, James Silva, the Amigos de Bolsa Chica, the Huntington Beach Chamber of Commerce, the Conference and Visitors Bureau, Huntington Dodge, the Huntington Beach Central Park Equestrian Center, Century Homes, the Bolsa Chica Conservancy, David Guido (Huntington Beach), Roxanne Lane (Huntington Beach), and Harry Crowell (Irvine).

Letters in opposition to the project approved by the City were received from the Bolsa Chica Land Trust (2 letters), Orange County Coastkeeper, Friends of Harbors, Beaches, and Parks, the Southeast Huntington Beach Neighbors Association, Jan Vandersloot, M.D., Nancy Donaven (Huntington Beach), and Ray Bervedicktus and George Hubner (San Clemente), and Tobie and Gerard Charles (Huntington Beach).

## **B. LOCAL GOVERNMENT ACTION**

On June 23, 1999, the City Zoning Administrator held a public hearing on the proposed project. At the conclusion of the public hearing, the Zoning Administrator approved with conditions local CDP No. 99-05, finding that the project, as conditioned, conformed with the City's Certified LCP. The action by the Zoning Administrator was appealable to the Planning Commission within the City's ten- (10) working day appeal period. No appeals were filed to the Planning Commission (Exhibit E). The City's action was then final and an appeal was filed by two Commissioners during the Coastal Commission's 10-day appeal period (Exhibit F).

The project approved by the City includes off-site mitigation at the Shipley Nature Center. The mitigation plan proposes to establish approximately 1.0 acre of wetland habitat and 1.4 acres of transitional wetland/upland and woodland habitats. The mitigation site is approximately four miles to the northwest of the subject site, located within Huntington Central Park. Huntington Central Park borders the Coastal Zone boundary on the outside of the boundary (Exhibit B). The mitigation site is located approximately 1,000 feet outside of the Coastal Zone boundary.

The local CDP was approved by the City, with seven special conditions (Exhibit E). Special condition Nos. 3 through 6 address the off-site mitigation. In the City's findings, Item 1 states that the City approved the concept of the Donald G. Shipley Nature Center Habitat Enhancement and Creation Program.

## **C. APPELLANTS' CONTENTIONS**

The Commission received the notice of final action on local CDP No. 99-05 on July 12, 1999. On July 26, 1999, within ten working days of receipt of the notice of final action, two Coastal Commissioners appealed the local action on the grounds that the approved project does not conform to the requirements of the Certified LCP (Exhibit F). The appellants contend that the proposed development does not conform to the requirements of the certified LCP in regards to the following issues:

### **i. Wetland Preservation and Enhancement**

The City's LUP portion of the certified LCP contains policies that require the preservation and enhancement of wetlands. The subject site contains a wetland and that finding is not disputed. The wetland fill approved by the City, therefore, raises a substantial issue as to its consistency with the certified LUP policies, which require that wetlands be preserved and enhanced.

### **ii. Allowable Use**

The City's certified LUP specifically incorporates Section 30233 of the Coastal Act. Section 30233 of the Coastal Act limits fill to eight enumerated uses. LUP Policy 8f in Section 9.5.4 reiterates that only the uses specifically identified in Section 30233 are allowed in wetlands. Although the City's approved CDP does not describe the future use of the site, the Addendum to the Supplemental EIR (SEIR 82-2) for the property indicates that the future use is expected to be residential (Exhibit G). Neither residential development nor grading for unspecified uses are allowable uses under Section 30233. Therefore, the project approved

by the City raises a substantial issue as to its consistency with the certified LUP policies that limit the types of use for which a wetland can be filled.

**iii. Conservation Overlay**

The subject site is addressed in the Implementation Plan portion of the City's certified LCP in the DTSP. The DTSP designated the subject site with a Conservation Overlay (Exhibit H). The Conservation Overlay states: If any wetland is determined by the CDFG to be severely degraded pursuant to Section 30233 and 30411 of the California Coastal Act, or if it is less than one (1) acre in size, other restorations options may be undertaken, pursuant to the LCP that has incorporated relevant Coastal Commission Guidelines (Exhibit H).

Based on this language the City's approval allows the on-site wetland to be filled in conjunction with an off-site mitigation program. However, with regard to wetlands less than one acre in size, the City's certified LCP indicates that some fill for a non-allowable use is appropriate only if the overall project is a restoration project. The project as approved by the City allows the fill of an existing wetland based on an off-site mitigation plan. Even though the City proposes off-site mitigation, the fill of an existing wetland can not be considered a restoration project. To be considered a restoration project, the existing wetland would need to be enhanced or new wetland would need to be created on-site.

The DTSP Conservation Overlay in the City's LCP also states that projects permitted under Section 30411, other than boating facilities, should result in no net loss of the acreage of wetland habitat located on the site. The project approved by the City would result in the loss of all on-site wetlands. Thus, the project approved by the City is not consistent with the requirements specified in the City's LCP .

**iv. Bolsa Chica Decision**

In addition to the inconsistencies with the certified LCP as mentioned above, the interpretation of Section 30411 contained in the DTSP Conservation Overlay is inconsistent with the Coastal Act as (see *Bolsa Chica Land Trust vs. Superior Court* (1999) 83 Cal. Rptr. 850). The appellate court held that Section 30411 may not be used as the basis for approval of uses, which would not otherwise be permitted in Section 30233 of the Coastal Act. The City's approval relies on an interpretation of the Coastal Act that has been invalidated by an appellate court. Therefore, the project as approved by the City raises a substantial issue as to its consistency with the certified LCP's Conservation.

#### **D. SUBSTANTIAL ISSUE ANALYSIS**

Section 30603(a)(1) of the Coastal Act states:

*The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division*

##### Appellants' Contentions That Raise a Substantial Issue

The contentions raised in the appeal present valid grounds for appeal in that they allege the project inconsistency with policies of the certified LCP and the Commission finds that a substantial issue is raised.

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

*With respect to appeals to the Commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.*

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (Cal. Code Regs., tit. 14, section 13115(b)). In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing petition for a writ of mandate pursuant to the Code of Civil Procedure, section 1094.5.

In this case, for the reasons discussed further below, the Commission exercises its discretion and determines that the development approved by the City raises a substantial issue with regard to the appellants' contentions regarding wetlands.

i. **SITE DESCRIPTION**

The subject site is located just inland of the intersection of Pacific Coast Highway and Beach Boulevard (Exhibits A and B). The wetland lies immediately to the west of Beach Boulevard. To the west of the wetland, a mobile home park formerly existed; however, the area is currently being graded in conjunction with the overall Waterfront Development project. South of the subject site is vacant land. Directly across Beach Boulevard from the subject site is a large salt marsh.

The City's approval of local CDP No. 99-05 allows the fill of 0.8 acres of wetland for unspecified development on a 5.01 acre parcel owned by the City (Exhibits I and J). The fill approved by the City would take place on a 2.9 acre portion of the parcel that is zoned "residential" with a Conservation Overlay. The northeastern most portion (approximately 1-acre) of the 2.9-acre area, which formerly contained alkali meadow habitat (Exhibit K), has already been cleared and graded. The remaining wetland area has been fenced-off. The southern 2.11-acre portion of the parcel that is not included in the conservation overlay has also been cleared and graded. Evidence of a coastal development permit for the fence and the grading and clearing activities on the 5.01 acre parcel has been requested from the City.

During periods of heavy rains, the subject wetland drains into the larger salt marsh that is across Beach Boulevard via drainpipes under the street. The wetland is not currently subject to tidal flushing due to the installation of flood control devices in the salt marsh east of Beach Boulevard to restrict seawater flow into the marsh during high tides. The subject wetland receives urban freshwater runoff from the properties to the west. However, even though the wetland is considered degraded, there is no dispute that the subject site contains wetlands as defined by the Coastal Act and the City's certified LCP.

The subject site is land use designated High Density Residential/Conservation. The zoning at the subject site is covered by the DTSP, which is a part of the Implementation Plan portion of the certified LCP. The wetland area is located in District 8b of the DTSP (Exhibit L). The use allowed in District 8b is "residential". However, a portion of District 8b is designated with a Conservation Overlay (Exhibit H). The subject site is located within the Conservation Overlay. The Conservation Overlay applies to 2.9 acres of the 5.01-acre parcel, including the area that was determined by the CDFG, pursuant to Section 30411, to be existing wetland (0.8 acre) and restorable wetland (1.4 acre). The CDFG wetland determination is contained in the "California Department of Fish and Game Determination of the Status of the Huntington Beach Wetlands", dated February 4, 1983 (Exhibit M).

Although the project approved under the local CDP includes only the fill of subject wetlands, the wetland area is part of a larger area known as the Waterfront Development Master Plan area. Environmental Impact Report (EIR) 82-2 was prepared for the Huntington Beach Downtown Specific Plan. The Waterfront Development project was conceptually discussed in that EIR. When a detailed development plan for the Waterfront Development project was proposed in 1988, a Supplemental EIR dated July 15, 1999 was prepared by EIP Associates of Los Angeles, California (SEIR 82-2, certified by the City in 1988). Proposed changes to the 1988 development plan for the Waterfront Development project required further environmental evaluation, and so the Addendum to the SEIR 82-2 was prepared. The Addendum to the SEIR is included as part of the City's record for the approved project.

Although the local approval does not describe the future use of the site, the Addendum to the SEIR indicates that the subject site is to be developed with residential development (Exhibit G).

**ii. ANALYSIS OF CONSISTENCY WITH CERTIFIED LCP**

As stated in Section A (iii) of this report, the local CDP may be appealed to the Commission on the grounds that it does not conform to the certified LCP or the public access policies of the Coastal Act. The Commission must then decide whether a substantial issue exists in order to hear the application de novo.

In this case, the appellants contend that the City's approval of the proposed project does not conform to the requirements of the certified LCP. Staff has recommended that the Commission find that a substantial issue does exist with respect to the grounds on which the appeal has been filed.

**a. Conservation Overlay**

The project location is subject to a Conservation Overlay in the certified LCP (Exhibit H). The Conservation Overlay is contained in the DTSP portion of the LCP's Implementation Plan. The subject site is located in District 8b of the DTSP (Exhibit L). Although District 8b extends beyond the subject site, the Conservation Overlay encompasses the entire project site. Development is permitted in the Overlay area only pursuant to an overall development plan for the Overlay area and subject to the following language contained in the Downtown Specific Plan Conservation Overlay (Exhibit H):

*If any wetland is determined by the Department of Fish and Game to be severely degraded pursuant to Sections 30233 and 30411 of the California Coastal Act, or if it is less than one (1) acre in size, other restoration options may be undertaken, pursuant to the Coastal Commission's "Statewide Interpretive Guidelines for Wetlands and other Wet Environmentally Sensitive Habitat Areas."*

The primary basis for the City's approval of the wetland fill was the above referenced language contained in the DTSP Conservation Overlay. This same language appears in the certified LUP in the Area-by-Area Discussion on page 126. The City's LCP addresses two separate restoration options where some fill of wetlands may occur for a use not specified in Section 30233. The first restoration option requires, among other things, that the subject wetland be less than one acre in size. The second restoration option applies to wetlands that have been identified by the CDFG as degraded pursuant to Section 30411. The subject site was determined to be degraded by the CDFG pursuant to Section 30411 and the wetland delineation figure and is less than one acre in size. Consequently, whether the proposed project qualifies as a restoration option allowed by the certified LCP must be evaluated.

**1) Total Wetland Acreage**

One of the circumstances in which the above-identified Conservation Overlay language applies is if the wetland in question is less than one acre in size. Based on the evaluations of the applicant's consultant, LSA Associates, Inc. (LSA) of Irvine, California and the Commission's Staff Ecologist, the subject wetland is approximately

0.696 acres (Exhibit N), which would mean that the Conservation Overlay language applies to the site (Exhibit H).

The Biological Resources Evaluation and Jurisdictional/Wetland Delineation for the Waterfront Development Site Huntington Beach, CA prepared by LSA Associates, Inc. dated February 4, 1998 (LSA Biological Evaluation) describes the 2.9 acre portion of the subject site that is subject to the Conservation Overlay. The biological evaluation includes a Vegetation Types map (Exhibit K). The map identifies the area determined by the applicant's consultant to be the 0.8-acre wetland area. Areas identified on the map, as alkali meadow, which includes plants such as alkali heath and saltgrass, were not included as part of the wetland acreage figure. The LSA Biological Evaluation finds that 0.57 acre consists of Coastal Brackish Marsh, 1.39 acre is Alkali Meadow, 0.18 acre is Ornamental Trees, and 0.72 acre of Disturbed/Ruderal vegetation. LSA concluded that only the 0.57-acre Coastal Brackish Marsh area should be considered wetland. The Commission's Staff Ecologist determined that in a later report by LSA, dated November 3, 1999, the delineated wetland areas totaled 0.58 of one acre.

LSA's biological evaluation also assesses the soils. The assessment found that the soil type at the subject site is Tidal Flats. Soils of the Tidal Flats soil series are considered hydric. However, the soils assessment also found that this native soil has been covered over by sandy fill material to depths of two to six feet. The fill is assumed to be the result of construction activity during the 1960s. The evaluation concludes that only the soils in the coastal brackish marsh, pickleweed, and cocklebur patches exhibit characteristics of hydric soils. However, hydric soils were identified at depths of two to four feet below the fill material. If the site were to be restored and enhanced, this deeper soil would be conducive to establishing wetland habitat. Therefore, the soil at the subject site has the potential to support wetland habitat.

The Commission's Staff Ecologist visited the subject site on October 14, 1999, and reviewed LSA's evaluations. The Staff Ecologist found additional areas of alkali heath, saltgrass, and willow, which also constitute wetland area. The additional wetland area totals 0.116 of one acre. Thus, the Commission's Staff Ecologist determined that the total wetland acreage on-site is 0.696 (Exhibit N).

Although the applicant's consultant identified only 0.57 acre of wetland at the subject site, the applicant decided to use the acreage figure based on the 1983 CDFG study (Exhibit M), which identified 0.8 acre of on-site wetland. The 0.8-acre area was the wetland figure used by the City when acting on the proposed project. Based on a site visit and review of the information provided by the applicant, Commission staff concurs with the applicant that the total existing wetland acreage on the site is less than one acre.

## **2) Application of the LCP when a Wetland is Less than One Acre in Size**

Based on the Commission's staff review of additional information provided by the applicant, the total acreage for the existing on-site wetland is 0.696 acre (Exhibit N). Thus the standards that apply if the wetland acreage figure is less than one acre must be considered. The LCP's Conservation Overlay provides that if the wetland is less

than one acre in size other restoration options may be undertaken if the wetland is small, extremely isolated and incapable of being restored.”

The City’s certified LCP, which incorporated by reference the Commission’s Interpretive Guidelines relative to wetlands and which thereby became a part of the LCP, indicates that restoration projects may include some fill for non-allowable uses (Exhibit H). However, the approved project is not itself a restoration project which might then include some fill for non-permitted uses.

The proposed project does not include any use of the subject site beyond the proposed fill itself. Grading for an unspecified use cannot be considered a restoration project. The Addendum to the SEIR prepared for the proposed project indicates that the future use of the site will be residential (Exhibit G). A project with the intended primary function as residential cannot be considered a restoration project. Although the proposed project includes an off-site mitigation plan, the purpose of the overall project, including both the fill and mitigation, cannot be considered a restoration project.

The mitigation site is located approximately four miles from the subject site, outside the coastal zone (Exhibit B). The mitigation program could go forward without the fill of the subject wetlands. In addition, the Fish and Game determination for the project site has determined that the freshwater wetland can feasibly be restored to a larger wetland. Therefore, the site is capable of being restored. Thus, the project does not meet the criteria of the certified LCP, and so is not permissible as an “other restoration option” under the Conservation Overlay in the certified Implementation Plan. In conclusion, the approved project does not qualify as a restoration project and is inconsistent with the certified LCP provisions that incorporate the Commission’s Guidelines.

### **3) Wetlands Degraded Pursuant to CDFG Determination and Section 30411**

The second circumstance in which the above-identified LCP Conservation Overlay language would apply is for the restoration of wetlands that have been identified by the DFG as degraded pursuant to Section 30411. The City’s certified LCP provides for fill of degraded wetlands for a non-allowable use only if the fill is proposed in conjunction with another restoration option, and if there is no net loss of wetland acreage on the subject site (Exhibit H). The LCP, which because it incorporated the Commission’s Guidelines, states: *“Projects permitted under Section 30411 other than boating facilities should result in no net loss of the acreage of wetland habitat located on the site as a minimum.”* The project approved by the City would result in the loss of all on-site wetlands. Therefore, the approved project raises a substantial issue of consistency with the LCP.

### **4) Bolsa Chica Decision**

The interpretation of Section 30411 contained in the City’s LCP by virtue of it’s incorporation of the Commission’s Guidelines, has been invalidated by the Fourth District Court of Appeal in Bolsa Chica Land Trust vs. Superior Court, 1999, 83 Cal. Rptr. 850 (Bolsa Chica). In Bolsa Chica, the appellate court held that Section 30411 may not be used as the basis for approval of uses, which would otherwise not be



permitted pursuant to Section 30233 of the Coastal Act. The City's approval relies on an application of its LCP interpreting section 30411 in a manner that has been invalidated by the Fourth Appellate District Court of Appeal. Therefore, the project approved by the City raises a substantial issue of consistency with the certified LCP .

## **5) Conclusion Regarding Conservation Overlay**

As identified above, the purpose of the overall project is not restoration since no wetlands will remain on site. In addition, the Fish and Game study for the project site indicates that wetland restoration at the project site can feasibly be accomplished. Therefore, the project is not allowable under the City's LCP Downtown Specific Plan Conservation Overlay, which discusses "other restoration options." Therefore, the approved project raises a substantial issue of consistency with the LCP .

### **b. LUP Wetland Policies**

The City's certified LCP Land Use Plan contains the following wetland protection policies:

#### **Section 9.5.4, Policy 8f:**

*Limit diking, dredging, and filling of coastal waters, wetlands, and estuaries to the specific activities outlined in Section 30233 and 30607.1 of the Coastal Act and to those activities required for the restoration, maintenance, and/or repair of the Municipal Pier; conduct any diking, dredging and filling activities in a manner that is consistent with Section 30233 and 30607.1 of the Coastal Act.*

**Section 9.5.5:**

Coastal Act policies clearly restrict uses and activities that are to be allowed in wetland areas. The City implements these Coastal Act policies primarily through its designation of all wetland areas in the coastal zone as Conservation. Coastal Act policy also requires that environmentally sensitive habitats be protected against the detrimental impacts of new development when proposed adjacent to these areas. The intent of the following policies is to provide for this protection:

*9. Preserve and enhance environmentally sensitive habitats including the Bolsa Chica, which is within the sphere of influence of the City of Huntington Beach.*

*9a. Approve only that development adjacent to wetlands and environmentally sensitive habitat areas that does not significantly degrade habitat values and which is compatible with the continuance of the habitat.*

*9b. Require new development contiguous to wetland or environmentally sensitive habitat area to include buffers, which will consist of a minimum of one hundred foot setback from the landward edge of the wetland where possible. If existing development or site configuration precludes a 100 foot buffer, the buffer shall be established according to the factors listed in Policy 9c and shall be reviewed by the Department of Fish and Game.*

*In case of substantial development or significantly increased human impacts, a wider buffer may be required in accordance with an analysis of the factors in Policy 9c.*

*9c. Develop specifications for buffers taking into consideration the following factors:*

*Biological Significance of Adjacent Lands. The buffer should be sufficiently wide to protect the functional relationship between wetland and adjacent upland.*

*Sensitivity of Species to Disturbance. The buffer should be sufficiently wide to ensure that the most sensitive species will not be disturbed significantly by permitted development, based on habitat requirements of both resident and migratory species and the short- and long-term adaptability of various species to human disturbance.*

*Susceptibility of Parcel to Erosion. The buffer should be sufficiently wide to allow for interception of any additional material eroded as a result of the proposed development based on soil and vegetative characteristics, slope and runoff characteristics, and impervious surface coverage.*

*Use of Existing Cultural Features to Locate Buffer Zones. Where feasible, development should be located on the side of roads, dikes, irrigation canals, flood control channels, etc., away from the environmentally sensitive habitat area.*

In addition to these LUP policies, the LUP includes discussion regarding the protection of wetlands (note: the LUP considers wetlands to be a type of environmentally sensitive area). Following is some of the discussion from the LUP regarding protection of wetlands:

*The City's coastal plan complements efforts by State and federal agencies to protect and enhance sensitive habitat areas. Principal objectives of the plan include:*

*Protection of significant habitat areas by requiring wetland enhancement and buffers in exchange for development rights.*

*Improvement of the aesthetic and biological quality of wetland areas.  
(Section 6.3, page 64)*

In addition, Section 9.5.4 of the City's LUP specifically incorporates Section 30233 of the Coastal Act. Section 30233 limits the fill of wetlands to eight enumerated uses. Although the City's approved coastal permit does not identify any use beyond the wetland fill, the Addendum to the SEIR indicates that it is expected to be residential. Neither residential development nor grading for unspecified uses are considered allowable uses under 30233. The City's LUP Policy 8f of Section 9.5.4 reiterates that only the specifically identified uses are allowed in wetlands under Coastal Act Section 30233. The proposed fill does not constitute one of the specifically enumerated uses under Section 30233 of the Coastal Act, which is specifically incorporated into the certified LUP. Therefore, the project as approved by the City raises a substantial issue of consistency with the LUP wetland policies of the City's certified LCP.

## **E. CONCLUSIONS REGARDING SUBSTANTIAL ISSUE ANALYSIS**

Based on an evaluation of the project approved by the City in CDP No. 99-05, it is evident that the purpose of the overall project is not restoration, since no wetlands will remain on site. In addition, the Fish & Game determination for the project site indicates that wetland restoration at the project site can feasibly be accomplished. Therefore, the project is not allowable under the City's LCP Downtown Specific Plan Conservation Overlay, which discusses "other restoration options." Section 9.5.4 of City's LUP also specifically incorporates Section 30233 of the Coastal Act which limits the fill of wetlands to eight enumerated uses. The proposed fill does not constitute one of the specifically enumerated uses under Section 30233 of the Coastal Act, which is specifically incorporated into the certified LUP. Finally, the *Bolsa Chica* decision makes clear that Section 30411 may not be used as the basis for approval of uses that would not otherwise be permitted in Section 30233 of the Coastal Act. The City's approval relies on an application of its LCP which interprets Section 30411 in a manner that has been invalidated by the appellate court in *Bolsa Chica*. For these reasons, the approved project raises a substantial issue of consistency with the City's certified LCP.

## **II. DE NOVO FINDINGS AND DECLARATIONS**

The Commission hereby finds and declares:

### **A. STANDARD OF REVIEW**

The action currently before the Commission is the de novo review of a proposed project located within the jurisdiction of the certified Huntington Beach Local Coastal Program (LCP). The Commission's standard of review for the proposed development is the certified Huntington Beach LCP. The Commission shall interpret the Huntington Beach LCP in light of applicable court rulings.

## **B. INCORPORATION OF SUBSTANTIAL ISSUE FINDINGS**

The findings and declarations on substantial issue are hereby incorporated by reference.

## **C. PROJECT DESCRIPTION**

The proposed project is the fill 0.8 acre of existing wetland and approximately 1.4 acres of restorable wetland for unspecified development on a 5.01 acre parcel owned by the City. The fill proposed by the applicants would occur on a 2.9-acre portion of the parcel that is zoned "residential" with a Conservation Overlay. The northeastern most portion (approximately 1-acre) of the 2.9-acre area, which formerly contained alkali meadow habitat (Exhibit K), has already been cleared and graded. The remaining wetland area has been fenced-off. The southern 2.11-acre portion of the parcel that is not included in the conservation overlay has also been cleared and graded. Evidence of a coastal development permit for the fence, grading, and clearing activities on the 5.01-acre parcel has been requested from the applicant and the City.

The proposed project includes off-site mitigation at the Shipley Nature Center. The mitigation plan proposes to establish approximately 1.0 acre of wetland habitat and 1.4 acres of transitional wetland/upland and woodland habitats. The mitigation site is approximately four miles to the northwest of the subject site, located within Huntington Central Park. Huntington Central Park borders the Coastal Zone boundary on the outside of the boundary (Exhibit B). The mitigation site is located approximately 1,000 feet outside of the Coastal Zone boundary.

The proposed project has been amended by the applicant for purposes of any de novo hearing to incorporate the conditions previously imposed by the City (Exhibit E).

## **D. CONSERVATION OVERLAY**

As discussed above, the proposed project location is subject to a Conservation Overlay in the certified LCP (Exhibit H). The Conservation Overlay is contained in the DTSP portion of the LCP's Implementation Plan. The subject site is located in District 8b of the DTSP (Exhibit L). Although District 8b extends beyond the subject site, the Conservation Overlay encompasses the entire project site. Based on the following evaluation of the DTSP Conservation Overlay, the Commission denies the proposed project, which does not conform to the wetland policies or implementation standards of the certified LCP.

The relevant Conservation Overlay language states:

*If any wetland is determined by the Department of Fish and Game to be severely degraded pursuant to Sections 30233 and 30411 of the California Coastal Act, or if it is less than one (1) acre in size, other restoration options may be undertaken, pursuant to the Coastal Commission's "Statewide Interpretive Guidelines for Wetlands and other Wet Environmentally Sensitive Habitat Areas."*

**i. Application of the LCP When a Wetland is Less than One Acre in Size**

Based on Commission's staff review of additional information provided by the applicant, it appears that the total acreage for the existing on-site wetland is 0.696 of one acre (Exhibit N). Thus the standards that apply if the wetland acreage figure is less than one acre must be considered. The LCP's Conservation Overlay (Exhibit H) provides that if the wetland is less than one acre in size, other restoration options may be undertaken if the wetland is small, extremely isolated, and incapable of being restored.

The City's certified LCP indicates that restoration projects may include some fill for a non-allowable use (Exhibit H). However, the proposed project is not itself a restoration project, which may then include some fill for non-permitted uses. The certified LCP states: "The Commission found in its decision on the Chula Vista LCP that projects which provide mitigation for non-permitted development may not be broadly construed to be restoration projects in order to avoid the strict limitations of the permitted uses in Section 30233."

The proposed project does not include any use of the subject site beyond the proposed fill itself. Grading for an unspecified use cannot be considered a restoration project. The Addendum to the SEIR prepared for the proposed project indicates that the future use of the site will be residential (Exhibit G). A project with the intended primary function as residential cannot be considered a restoration project. Although the proposed project includes an off-site mitigation plan, the purpose of the overall project, including both the fill and mitigation, cannot be considered restoration.

The City's certified LCP also states that restoration projects may include some fill for unpermitted uses if all of the five listed criteria are met. One of the criteria is that, "The wetland to be filled is so small (e.g., less than 1 acre) and so isolated (i.e., not contiguous to a larger wetland) that it is not capable of recovering and maintaining a high level of biological productivity without major restoration activities." Although this wetland area is less than one acre in size, it is contiguous to a larger wetland area located south of Beach Boulevard. The wetlands are connected under Beach Boulevard via pipes. This larger wetland area and the smaller wetland north of Beach Boulevard were once part of a larger wetland area associated with the mouth of the Santa Ana River prior to its channelization (LSA, 1998). Furthermore, the 1983 CDFG Study (Exhibit M) concluded that this wetland area could feasibly be restored with relatively minor restoration activities. Based on these facts, the subject wetland does not meet LCP criteria that would allow restoration projects that include fill for unpermitted uses.

Another criteria that must be met requires that, "The wetland must not provide significant habitat value to wetland fish and wildlife species, and must not be used by any species which is rare or endangered." Appendix 1 of the 1983 CDFG Study (Exhibit M) on the Huntington Beach wetlands lists the presence of several wetland plant species at the subject site. LSA's studies, and the Commission's Staff Ecologist both confirmed the presence of several wetland plant species at the subject site. Staff also noted during a site visit on March 2, 2000, the presence of numerous Red-winged blackbirds (*Agelaius phoeniceus*) and one Snowy egret (*Egretta thula*) along with various other bird species. Appendix 2 of the 1983 CDFG Study is a list of the birds of the Huntington Beach wetlands. Appendix 2 of the CDFG Study lists the Snowy egret as a "Wading bird" and the Red-winged blackbird is listed under "Miscellaneous wetland-related species." It is clear that the wetland at the subject site

provides habitat value to various wetland and wetland related species. Therefore, the subject wetland does not meet LCP criteria that would allow restoration projects that include fill for unpermitted uses.

Other LCP criteria that must be met prior to granting an exception for a restoration project that may include fill for non-permitted uses require that, "Restoration of a another wetland to mitigate for fill can most feasibly be achieved in conjunction with filling a small wetland," and "Restoration of a parcel to mitigate for the fill ...must occur in the same general region (e.g., within the general area surrounding the same stream, lake or estuary where the fill occurred)." The mitigation site is located approximately four miles from the subject site, outside of the coastal zone (Exhibit B). The mitigation program could go forward without the fill of the subject wetlands. Clearly, the mitigation program is neither dependent on the on-site wetlands being filled, nor is it located in the same general region as described above. Thus, the project does not meet the criteria of the LCP and so is not permissible as an "other restoration option" under the Conservation Overlay in the certified Implementation Plan.

#### **ii. Wetlands Degraded Pursuant to CDFG Determination and Section 30411**

The second circumstance in which the above-identified LCP Conservation Overlay language would apply is for the restoration of wetlands that have been identified by the CDFG as degraded pursuant to Section 30411. The City's certified LCP provides for fill of degraded wetlands for a non-allowable use only if the fill is proposed in conjunction with another restoration option, and if there is no net loss of wetland acreage on the subject site (Exhibit H). The LCP states: "Projects permitted under Section 30411 other than boating facilities should result in no net loss of the acreage of wetland habitat located on the site as a minimum." The proposed project would result in the loss of all on-site wetlands and is thus not permissible as an "other restoration option" under the certified LCP's Conservation Overlay.

In addition, even if the proposed project could be considered a restoration project, the interpretation of Section 30411 contained the City's LCP has been invalidated by the Fourth District Court of Appeal in Bolsa Chica Land Trust vs. Superior Court, 1999, 83 Cal. Rptr. 850 (Bolsa Chica). In Bolsa Chica, the appellate court held that Section 30411 can not be interpreted in a manner that permits uses that would otherwise not be permitted pursuant to Section 30233 of the Coastal Act. Therefore, the provisions of Section 30411 in the City's certified LCP cannot be used as a basis for justifying fill of wetlands inconsistent with the provisions of Section 30233, also contained in the City's LCP. Therefore, the proposed project must be denied.

#### **iv. Conclusion Regarding Conservation Overlay**

As identified above, the project is not allowable under the City's LCP Downtown Specific Plan Conservation Overlay, which discusses "other restoration options." Therefore, the proposed project is inconsistent with the Conservation Overlay contained in the City's certified LCP. The proposed project should therefore be denied.

### **E. LUP WETLAND POLICIES**

The City's certified LCP Land Use Plan contains the following wetland protection policies:

**Section 9.5.4, Policy 8f:**

*Limit diking, dredging, and filling of coastal waters, wetlands, and estuaries to the specific activities outlined in Section 30233 and 30607.1 of the Coastal Act and to those activities required for the restoration, maintenance, and/or repair of the Municipal Pier; conduct any diking, dredging and filling activities in a manner that is consistent with Section 30233 and 30607.1 of the Coastal Act.*

**Section 9.5.5:**

Coastal Act policies clearly restrict uses and activities that are to be allowed in wetland areas. The City implements these Coastal Act policies primarily through its designation of all wetland areas in the coastal zone as Conservation. Coastal Act policy also requires that environmentally sensitive habitats be protected against the detrimental impacts of new development when proposed adjacent to these areas. The intent of the following policies is to provide for this protection:

*9. Preserve and enhance environmentally sensitive habitats including the Bolsa Chica, which is within the sphere of influence of the City of Huntington Beach.*

*9a. Approve only that development adjacent to wetlands and environmentally sensitive habitat areas that does not significantly degrade habitat values and which is compatible with the continuance of the habitat.*

*9b. Require new development contiguous to wetland or environmentally sensitive habitat area to include buffers which will consist of a minimum of one hundred foot setback from the landward edge of the wetland where possible. If existing development or site configuration precludes a 100 foot buffer, the buffer shall be established according to the factors listed in Policy 9c and shall be reviewed by the Department of Fish and Game.*

*In case of substantial development or significantly increased human impacts, a wider buffer may be required in accordance with an analysis of the factors in Policy 9c.*

*9c. Develop specifications for buffers taking into consideration the following factors:*

*Biological Significance of Adjacent Lands. The buffer should be sufficiently wide to protect the functional relationship between wetland and adjacent upland.*

*Sensitivity of Species to Disturbance. The buffer should be sufficiently wide to ensure that the most sensitive species will not be disturbed significantly by permitted development, based on habitat requirements of both resident and migratory species and the short- and long-term adaptability of various species to human disturbance.*

*Susceptibility of Parcel to Erosion. The buffer should be sufficiently wide to allow for interception of any additional material eroded as a result of the proposed development based on soil and vegetative characteristics, slope and runoff characteristics, and impervious surface coverage.*

*Use of Existing Cultural Features to Locate Buffer Zones. Where feasible, development should be located on the side of roads, dikes, irrigation canals, flood control channels, etc., away from the environmentally sensitive habitat area.*

In addition to these LUP policies, the LUP includes a discussion regarding the protection of wetlands (note: the LUP considers wetlands to be a type of environmentally sensitive area). Following is some of the discussion from the LUP regarding protection of wetlands:

*The City's coastal plan complements efforts by State and federal agencies to protect and enhance sensitive habitat areas. Principal objectives of the plan include:*

*Protection of significant habitat areas by requiring wetland enhancement and buffers in exchange for development rights.*

*Improvement of the aesthetic and biological quality of wetland areas.  
(Section 6.3, page 64)*

In addition, the City's LUP specifically incorporates Section 30233 of the Coastal Act. The Coastal Act limits the fill of wetlands to the uses specified in Section 30233 and only where there is no feasible less environmentally-damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects. The following subsections describe the consistency of the proposed project with the certified LCP.

**a. Allowable Use**

Although the proposed project does not identify a specific use for the wetland fill, the Addendum to the SEIR indicates that the use is expected to be residential. Neither residential development nor grading for unspecified uses are allowable uses under Section 30233. The City's LUP Policy 8f of Section 9.5.4 reiterates that only the specifically identified 30233 uses are allowed in wetlands. The proposed fill does not constitute one of the specifically enumerated uses under Section 30233 of the Coastal Act, which is specifically incorporated into the City's certified LCP. Therefore, the proposed project is inconsistent with the wetland policies of the City's certified LCP. Therefore, the proposed project must be denied.

**b. Alternatives**

The applicants submitted an alternatives analysis prepared by LSA, dated November 5, 1999, for the proposed fill of the on-site wetland (Exhibit C). The analysis considered three alternatives: 1) to maintain the wetlands on-site in their current condition; 2) to restore the on-site wetlands and transitional area; and 3) to provide off-site habitat enhancement to offset proposed project impacts.

LSA dismisses the first alternative of retaining the wetlands on-site in their current condition due to the degraded nature of the wetlands. Regarding this alternative, the applicant's biological consultant states, in part: "As an isolated and degraded resource, the wetland and transitional area do not function as an integral part of a larger habitat area. The parcel recommended to be filled is of marginal habitat value due to its small size, isolation from other habitat areas, poor soil quality, poor water quality, and poor faunal representation."



The consultant also dismisses this alternative due to the fact that the wetland is not tidally influenced.

However, a review of LSA's February 1998 report suggests that tidal influence can be restored to the wetland, due to its connection to the salt marsh east of Beach Boulevard through pipes under Beach Boulevard. LSA's report discusses a "flap gate" that allows water to drain from the salt marsh across Beach Boulevard from the subject site, but "prevents seawater from backing up into the marsh during high tides." Therefore, the "flap gate" restricts tidal action to the salt marsh and, consequently, to the subject wetland which is connected to the salt marsh via pipes.

LSA dismisses the second alternative of on-site wetlands restoration because the primary water supply feeding the wetlands is low quality urban runoff; and, if the site were restored it would provide only minimal habitat value. The applicant's biological consultant has indicated that restoration of the on-site wetlands would provide only minimal habitat value due to its location surrounded by urban development.

According to the applicants, the mobile home park was removed in mid-1999. The pavement has been removed from the area surrounding the wetland providing a more "absorbent" surface of exposed soil. Therefore, the amount of "urban runoff" reaching the subject wetland since mid-1999 has most likely been reduced. The subject wetland, however, is still viable and is providing valuable habitat to various wetland and wetland related species as previously described in the Conservation Overlay section above.

LSA's February 1998 report also states that, "Site hydrology is also directly affected by natural groundwater levels...", and "The lowest lying area on the site, near the southern end, ponds water and appears to coincide with the level of local groundwater." LSA's February 1998 report also states that monitoring has been conducted near the subject wetland over a period of more than ten years. Although the data was not presented in LSA's report, LSA states that, "... the typical groundwater level does not exceed 1.2 feet above MSL, and probably averages less than 1.0 feet above MSL in most years." A report prepared by G.A. Nicholl, "Geotechnical EIR", dated January 22, 1998, and attached to the Addendum to SEIR 82-2 also states that groundwater elevations of monitoring wells on the Ocean Grand Resort property, "range from 1 foot above MSL to 3 inches below MSL..." An elevation survey of the subject wetland was conducted by LSA and described in, "Wetland Analysis According to Coastal Act Wetland Definition," dated November 3, 1999. LSA's survey Figure 2 (Exhibit O) indicates that the ground surface elevations above mean sea level (MSL) range from 0.09 feet above MSL in the wetland areas (wetland bottom) to 3.14 feet above MSL in the transitional and upland areas. Staff has requested that further information on the groundwater monitoring that has been conducted at the Ocean Grand Resort property, which includes the subject parcel.

Based on the information provided by LSA, the typical elevation of groundwater in the vicinity of the subject site is greater than the surveyed elevation of the wetland bottom. Direct influence by local groundwater may be providing the wetland with another, more consistent water source than urban runoff. Therefore, for the reasons stated above, the second alternative of on-site wetlands restoration cannot be dismissed by the applicants

The third alternative, off-site mitigation, was chosen by the applicant and the City as the preferred alternative because the proposed off-site location (Shipley Nature Center) is a part

of a larger wetlands and uplands habitat enhancement program, including restoration, enhancement, and creation of additional freshwater wetland. The applicant has indicated that the Shipley Nature Center is a high value habitat area; that the proposed restoration area is entirely surrounded by existing natural habitat areas; and that the wetlands at the mitigation site are reportedly fed primarily by groundwater, augmented by urban runoff and localized irrigation.

In addition, regarding the subject site, the 1983 CDFG Study (Exhibit M) states:

*The portion of the study area (5.0 ac.) west of Beach Boulevard, consists of 0.8 acres of fresh/brackish water marsh and 4.2 acres of former wetland and upland, of which 1.4 acres are restorable as wetland. The 0.8-acre pocket of freshwater wetland has been degraded because of its reduced size, configuration, location and overgrown condition. In order to effect restoration of this wetland such that wildlife values are improved, it would be necessary to both expand its size and decrease the ratio of vegetated to non-vegetated wetland. In this regard, it would be highly advantageous to create non-vegetated open-water area of roughly a 4-foot depth. This 4-foot depth would be adequate to largely preclude invasion by cattails. Lastly, the wetland in this area should be fenced.*

*This freshwater wetland could feasibly be restored to 2.2 ac (0.8 ac of existing wetland and 1.4 ac of restorable historic wetland). ... This wetland area could be enhanced by increasing both its size and the ratio of open-water to vegetated wetland areas. We find that these restorative measures are all minor, and therefore, can be feasibly accomplished.*

The CDFG Study follows this language with conditions that must be met if offsite mitigation is deemed necessary. As discussed below in the section on mitigation, these conditions are not satisfied. Moreover, it has not been demonstrated that off-site mitigation is necessary. Off-site mitigation is only evaluated as a last resort option, and the CDFG Study clearly indicates that there would be a benefit to retaining and enhancing the wetland onsite.

In addition, Section 30233, as expressly incorporated into the City's certified LCP, requires that any fill of wetlands, in addition to being an allowable use, must also be the least environmentally-damaging alternative. Given the size of the 5.01-acre parcel, the parcel can be developed without impacting the wetland area. Also, the 1983 CDFG Study clearly indicates on-site restoration is feasible. Retaining the wetland on-site and on-site wetland restoration are both feasible alternatives. Total loss of the on-site wetlands cannot be considered the least environmentally-damaging alternative, even if higher value habitat is created elsewhere. The on-site wetlands clearly are degraded. It has been argued that the only way to finance the off-site mitigation is to allow the filling of the on-site degraded wetlands. However, there is no provision in the City's certified LCP that would allow fill of existing wetlands in order to finance the enhancement of off-site wetlands. The degraded nature of the on-site wetlands does not provide a basis to justify filling them.

Although the proposed mitigation site may be a significant habitat area, it does not eliminate the necessity for the proposed project to conform to the City's certified LCP, which includes the requirements of Section 30233. Retention of the existing wetlands on-site is a feasible alternative and would be less environmentally-damaging than elimination of the wetland. Even on-site wetlands restoration would be a feasible alternative that would be less

environmentally-damaging than the fill of the wetland. Therefore, the proposed project is not the least environmentally-damaging alternative and so is inconsistent with the City's certified LCP requirement to be the least environmentally damaging alternative. Therefore, the proposed project must be denied.

### **c. Feasible Mitigation**

Section 9.5.4 of the City's LUP policies require that marine resources, including wetlands, be maintained, enhanced and restored, where feasible, to mitigate the adverse impacts of development on the City's marine resources. Section 9.5.4, Subsection 8.f. of the City's LUP relates to the fill of wetland, and states the following:

*8.f. Limit diking, dredging, and filling of coastal waters, wetlands, and estuaries to the specific activities outlined in Section 30233 and 30607.1 of the Coastal Act and to those activities required for the restoration, maintenance, and/or repair of the Municipal Pier; conduct any diking, dredging and filling activities in a manner that is consistent with Section 30233 and 30607.1 of the Coastal Act.*

As determined in the preceding section of this report, the proposed fill of the subject wetland is not the least environmentally damaging alternative for the development of this parcel. In fact, the very nature of the proposed project will alter and destroy the existing wetland habitat at the subject site. Therefore, the proposed project is inconsistent with the policies set forth in the City's certified LCP.

In addition, as stated above, the 1983 CDFG Study (Exhibit M) that is referred to in the Conservation Overlay and the City's LCP, states that this wetland area could feasibly be restored to 2.2 acres of wetland area, and requires that certain conditions be met if off-site mitigation is deemed necessary. These conditions include the following requirements:

- (2) The new mitigation should result in creation of at least 2.2 acres of wetlands which is presently the potential restoration acreage onsite.*
- (3) The site chosen must be non-wetland in its present condition.*

The proposed project does not satisfy either of the above-identified LCP mitigation requirements. The proposed project includes off-site mitigation at an existing wetland area in the Shipley Nature Center. The proposed mitigation is outlined in LSA's, *Habitat Mitigation and Monitoring Proposal*, dated December 18, 1998 (HMMP). The mitigation site is located approximately four miles to the northwest of the subject site within Huntington Central Park. Huntington Central Park borders the Coastal Zone boundary on the outside of the boundary (Exhibit B). The mitigation site within the park is located approximately 1,000 feet outside of the Coastal Zone boundary.

The HMMP proposes to create 1.0 acre of new coastal brackish marsh and transitional wetland habitats, and to enhance 1.4 acres of existing transitional wetland, upland and woodland habitats within Shipley Nature Center. The proposed mitigation plan includes establishing the hydrologic regime necessary to support the new wetland habitat. The creation of the new hydrologic regime will require excavating several basins to below the average water table depth. The basins are designed to enlarge the existing wetland and open water habitat area in the preserve. Therefore, because the site chosen contains

existing wetland, the mitigation is inconsistent with the LCP requirement that the site chosen be non-wetland in its present condition.

Numerous Commission actions have established criteria for wetland fill that encourage on-site mitigation that results in no net loss of wetland habitat. If on-site mitigation is not feasible, off-site mitigation within the Coastal Zone Boundary may be allowed as a last resort. The proposed mitigation site is located approximately 1,000 feet outside of the Coastal Zone boundary. Therefore, the mitigation is not dependent on the fill of the on-site wetland, and is inconsistent with the LCP's criteria for wetland fill. In addition, because the off-site mitigation is outside of the Coastal Zone and proposes to create only 1.0 acre total of new wetland and transitional wetland habitat, the proposed mitigation is not adequate to fully offset the proposed fill of the on-site wetland habitat.

The applicants propose a ratio of mitigated acres to impacted acres of 3:1; however, this ratio includes the proposed enhancement of 1.4 acres of existing transitional wetland upland and woodland habitats. Because neither out-of-kind mitigation nor enhancement of existing wetlands can fully mitigate the loss of wetlands, only the 1.0-acre of proposed new wetland and transitional wetland can be included in the mitigation ratio. Thus, using the 0.8-acre wetland area described in the HMMP, the mitigation ratio is actually reduced to approximately 1.25:1. The Commission's Staff Ecologist has determined the total wetland acreage to be 0.696 (Exhibit N). Using the total wetland area determined by the Commission's Staff Ecologist, 0.696 acre, the proposed mitigation ratio would then be increased from 1.25:1 to approximately 1.44:1.

The mitigation plan, however, proposes to create only 1.0 acre of new wetland and transitional wetland habitat (1 acre total) and to enhance 1.4 acres of existing transitional wetland, upland and woodland habitats. Pursuant to the 1983 CDFG Study, in order to fully mitigate the impacts of the loss of wetland, the mitigation must create at least 2.2 acres of wetland habitat. Only the creation of the 1.0 acre total of new wetland and transitional wetland habitat can be considered as appropriate mitigation for the proposed project. Therefore, the project is inconsistent with the LCP requirements that the mitigation should result in at least 2.2 acres of wetland habitat.

The HMMP does not provide a detailed discussion of the proposed monitoring field methods that will be used to determine the success of the mitigation. The mitigation proposal also indicates that the restoration consultant may perform the monitoring. To ensure that the mitigation is successful, the final determination of whether the restoration meets performance standards should take place at least three years after all restoration and maintenance activities have been completed. The proposed monitoring should also be performed by an independent consultant chosen by the permitting and resource agencies, unless the applicants propose ongoing maintenance in perpetuity.

Finally, the HMMP states on page 7-2, "Specific performance standards may be waived by the Corps and CDFG if monitoring indicates good growth towards a functional habitat, or if all reasonable corrective actions have been identified and implemented." The creation of new wetland habitat in upland areas, and areas without the appropriate naturally occurring soil types can be difficult to accomplish. The success rate of man-made wetland habitat is generally less than with the restoration of naturally occurring wetland habitat. If the performance standards can be waived as described above, the expected mitigation to compensate for the loss of existing valuable wetland habitat may not be achieved.

Therefore, on-site mitigation or restoration of the existing wetland area is preferable to the proposed off-site mitigation at Shipley Nature Center.

The proposed mitigation plan for the in-kind creation of a total of 1.0 acre of new wetland and transitional wetland is not sufficient to offset the proposed fill of 0.696 acre of existing wetland habitat. Neither the type nor the amount of the proposed mitigation is adequate to offset the fill of the existing 0.696-acre of existing wetland habitat consistent with the requirements of the certified LCP. Therefore, the proposed project must be denied.

#### **F. CALIFORNIA ENVIRONMENTAL QUALITY ACT**

Section 13096 of the California Code of Regulations requires Commission approval of CDP application to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment.

Previous sections of these findings contain documentation of the significant adverse impacts of the proposed development. Specifically, the significant adverse impact resulting from the proposed project is elimination of the existing on-site wetland inconsistent with the certified LCP's wetland protection policies. Feasible alternatives exist that would eliminate the project's adverse impacts. At a minimum, a feasible alternative would be to retain the wetland on-site and provide the buffer between it and adjacent future development. An additional alternative would be to retain and restore the wetland on-site. Therefore, there are feasible alternatives available, which would substantially lessen any significant adverse impact that the activity would have on the environment including some uses allowed in Section 30233 of the Coastal Act. Therefore, the Commission finds the proposed project is not consistent with the requirements of the Coastal Act to conform to CEQA.